

DIAMOND B. INDUSTRIES, INC.

IBLA 94-275

Decided January 30, 1997

Appeal from a decision of the Montana State Office, Bureau of Land Management, declaring unpatented mining claims abandoned and void. M MC 53025(SD) et al.

Affirmed.

1. Mining Claims: Abandonment–Mining Claims: Rental or Claim Maintenance Fees: Generally–Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

A claimant seeking a small miner exemption from the payment of rental fees for mining claims located on National Forest lands must be under an approved notice or a plan of operations issued under 36 CFR Part 228 on Aug. 31, 1993. If the claimant does not meet this requirement for an exemption, mining claims are properly declared abandoned and void where no rental has been paid before the deadline date.

APPEARANCES: Ober L. Torvik, Secretary, Diamond B. Industries, Inc., for appellant.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Diamond B. Industries, Inc., has appealed from the January 4, 1994, decision of the Montana State Office, Bureau of Land Management (BLM), declaring eight unpatented mining claims abandoned and void for failure to pay rental in the amount of \$100 per claim or to qualify for exemption from payment of rental fees because appellant's plan of operations had not been approved by August 31, 1993. ^{1/} Although BLM found that appellant's plan had been approved by the U.S. Forest Service on November 22, 1993, it also found that the approval had occurred too late to qualify for the exemption.

^{1/} The claims and serial numbers are as follows: IDA (M MC 53205(SD)), Ida No. 2 (M MC 91465 (SD)), Stewart Fraction (M MC 91469(SD)), Shirley A Fraction (M MC 99181(SD)), King Ober Fraction (M MC 99182(SD)), SILVER QUEEN (M MC 133371(SD)), Silver Queen #1 (M MC 133372(SD)), and SILVER QUEEN #2 (M MC 133373(SD)).

A provision of the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (the Act), P.L. 102-381, 106 Stat. 1378-79 (1992), establishes that

for each unpatented mining claim, mill or tunnel site on federally owned lands, in lieu of the assessment work requirements contained in the Mining Law of 1872 (30 U.S.C. 28-28e), and the filing requirements contained in section 314 (a) and (c) of the Federal Land Policy and Management Act of 1976 (FLPMA) (43 U.S.C. 1744 (a) and (c)), each claimant shall, except as provided otherwise by this Act, pay a claim rental fee of \$100 to the Secretary of the Interior or his designee on or before August 31, 1993 in order for the claimant to hold such unpatented mining claim, mill or tunnel site for the assessment year ending at noon on September 1, 1993 * * *.

106 Stat. 1378. The Act also contained an identical provision establishing rental fees for the assessment year ending at noon on September 1, 1994, requiring payment of an additional \$100 rental fee on or before August 31, 1993. 106 Stat. 1378-79.

Implementing Departmental regulations provided as follows:

Mining claim or site located on or before October 5, 1992. A nonrefundable rental fee of \$100.00 for each mining claim, mill site, or tunnel site, shall be paid on or before August 31, 1993, for each of the assessment years beginning on September 1, 1992, and September 1, 1993, or a combined rental fee of \$200.

43 CFR 3833.1-5(b) (1993).

The only exemption provided from this rental fee requirement is the so-called "small miner exemption," available to claimants holding 10 or fewer claims on Federal lands who meet all the conditions set forth in 43 CFR 3833.1-6(a) (1993). Washburn Mining Co., 133 IBLA 294, 296 (1995). The regulations require that a claimant must apply for the small miner exemption by filing separate certificates of exemption on or before August 31, 1993, supporting the claimed exemption for each assessment year claimed. 43 CFR 3833.1-7(d) (1993).

The small miner exemption was not intended to cover all miners who held 10 claims or less, only those who were already actively engaged in small scale mining or exploration. Thus, those claiming the exemption were required to be operating under a notice or plan of operations and producing between \$1,500 and \$800,000 in gross revenue per year, or to be engaged in active exploration. Because of the short time period to establish entitlement to the exemption, few inactive miners could reasonably expect to secure the necessary approval of their plans by the time the certification of their exemption was due.

In publishing its regulations, BLM anticipated that many small miners would not be able to qualify for the exemption within the time required, and provided: "A claimant who owns 10 or fewer claims, mill sites, or tunnel sites, and otherwise meets the requirements of this section, is not precluded from paying the rental fee in addition to filing for a small miner exemption." 43 CFR 3833.1-6(a)(1) (1993). In publishing this rule, BLM explained: "Such a payment would ensure that claims will not be declared void should the small miner status be denied for a particular claimant." 58 FR 38190 (July 15, 1993). The instant appeal presents a case in which the miner chose not to pay the rental fee and took the risk that entitlement to the exemption could be established by the critical date.

[1] The specific requirements with respect for notices or plans of operations are as follows:

(a) In order to qualify for an exemption from the rental fee requirements, a small miner shall meet all the following conditions:

* * * * *

(4) The mining claims shall be under:

(i) One or more Notices or approved Plans of Operations pursuant to subparts 3802 or 3809 of this title; or

(ii) A Notice or a Plan of Operations issued under parts 9 and 228 of title 36 of the Code of Federal Regulations for National Park System lands and National Forest System lands respectively; or

(iii) A special use permit issued by a Federal agency for the mining or removal of locatable minerals; or

(iv) A State or local authority mining or reclamation permit if the surface estate of the mining claim is not in Federal ownership.

43 CFR 3833.1-6(a)(4)(1993). A claimant such as appellant who seeks a small miner exemption for mining claims located on National Forest lands must have secured approval of a notice or a plan of operations issued under 36 CFR Part 228 on or before August 31, 1993. If the claimant does not meet this requirement for an exemption, mining claims are properly declared abandoned and void where no rental has been paid before the deadline date. Robert Limbert, 135 IBLA 364 (1996); Ronald E. Milar, 133 IBLA 214 (1995).

On July 2, 1993, appellant filed certificates of exemption for both years for the claims involved in this appeal and for two other claims, but in a notice dated July 26, 1993, BLM informed appellant that additional

requirements had to be met. ^{2/} Appellant had not provided information showing that the claims were under a notice, approved plan of operations, or special use permit, and the issuing agency had not been identified. BLM gave appellant 30 days from the date of receipt of its letter to file the requested information and advised appellant of the need to file a \$100 fee for each claim if appellant was unable to provide the information that would qualify appellant for the exemption within the time required.

On August 12, appellant provided BLM copies of notices and a plan filed with an agency of the State of South Dakota in 1984 that were still in effect together with appellant's notices of assessment work. The notices of assessment work were also sent to the Forest Service's District Ranger, who in a letter to appellant dated August 26 stated that appellant did not offer any description of the work so that he was "unable to acknowledge your mining or exploration activity for the small miner exemption." Appellant further described his plan in a letter to the District Ranger dated August 28, a copy of which was received by BLM on September 2. In response to another letter from appellant dated September 13, the Forest Service approved appellant's plan by letter dated November 22, 1993.

Appellant states that "[t]he direct cause of this decision is the overloaded work of the Nemo Ranger Station, Deadwood, S. Dak," and that "[t]he required paperwork was in the hands of the BLM office in Billings, Montana before the August 31st. deadline." However, we find nothing in the record that suggests any undue delay on the part of the Forest Service, which promptly responded to all of appellant's submissions. The Forest Service provided BLM a copy of its approval letter, and in a letter to BLM dated December 29, 1993, stated:

We first received a letter from Mr. Torvik, August 20, 1993 which included a Notice of Assessment and a map of the claim block. It did not include any information on what work they planned to do on the claims. I responded with a letter [dated August 26] requesting more information on what they planned to do. We received a letter from Mr. Torvik August 28, 1993 stating that they planned on drilling several holes in the area. We requested a map of the drill hole locations in order to comply with cultural resources regulations. We received the map September 13, 1993. We then requested public comment on the proposal (none received.) The approval letter was sent out November 22, 1993.

^{2/} The two other claims were the FS 1 (M MC 133374(SD)) and the FS 7 (M MC 88206(SD)). BLM's July 26 notice stated that records for the FS 7 claim showed that there were joint owners who were also required to sign the certificate of exemption and appellant notified BLM in his Aug. 9 letter that the FS 7 claim was being dropped. Although the certificates of exemption for the claims in this appeal included the FS 1 claim, that claim was not listed in the decision from which the instant appeal is taken.

Appellant further states that it had "all plans and permits for drilling exploration holes" from a South Dakota state agency. We note, however, that state permits satisfy the requirement only if the surface estate of the mining claim is not in Federal ownership. See 43 CFR 3833.1-6(a)(4)(iv) (1993). These claims are in a National Forest.

Appellant faults BLM for accepting "our payment for filing fees, which incidentally they have kept apparently with the knowledge they were going to deny our claims and the Small Miners Exemption." The filing fees were accepted on August 12 when appellant filed his notices of assessment work. These fees were properly accepted at that time because even if appellant was not able to obtain approval of a plan to qualify for the exemption, appellant still had until August 31 to submit the rental fee for each claim.

We are aware that claimants who were not under notices or plans of operations were placed in a position in which they had to quickly obtain them in order to qualify for the small miner exemption. However, we find no flexibility in either the statute or implementing regulations that would allow a claimant additional time beyond August 31, 1993, to secure the required authorization. The small miner exemption was unavailable in such circumstances; the only way to preserve the claims was to pay the rental fees.

Where a mining claimant fails to qualify for a small miner exemption from the rental fee requirement, failure to pay fees in accordance with the Act and regulations results in a conclusive presumption of abandonment. Lee H. and Goldie Rice, 128 IBLA 137, 141 (1994). The Department is without authority to excuse lack of compliance with the rental fee requirement of the Act, to extend the time for compliance, or to afford any relief from the statutory consequences. There is no evidence of payment in the record. In the absence of rental or exemption, BLM properly declared the claims abandoned and void.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

T. Britt Price
Administrative Judge

I concur.

C. Randall Grant, Jr.
Administrative Judge

